NO. 86-2049

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

BARRY E. BAYER,

Petitioner,

v.

R. VAN JOHNSON, Secretary of Revenue for the STATE OF SOUTH DAKOTA,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF SOUTH DAKOTA

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

I.

DID THE DECISION OF THE SOUTH DAKOTA SUPREME COURT UNCONSTITUTIONALLY DEPRIVE PETITIONER BAYER OF HIS PROPERTY WITHOUT DUE PROCESS OF LAW WHEN THE SOUTH DAKOTA SUPREME COURT DETERMINED SUA SPONTE THAT PUBLIC POLICY REASONS JUSTIFIED DENYING PETITIONER BAYER ACCESS TO THE COURTS TO RECOVER SALES TAX PAID UNDER PROTEST ON BOOKMAKING ACTIVITIES?

Petitioner, Barry E. Bayer, has at all times been a party to this litigation. Petitioner will be referred to as "Bayer." Respondent, R. Van Johnson, is the former Secretary of Revenue for the State of South Dakota. The South Dakota Department of Revenue will be referred to as "Department."

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The 1987 opinion of the South Dakota Supreme Court in Bayer v. Johnson, is reported at 400 N.W.2d 884, and appears in the Appendix (A - 3). The 1984 opinion of the South Dakota Supreme Court in Bayer v. Johnson, is reported at 349 N.W.2d 447, and appears in the Appendix (A - 40). The October 29, 1985, memorandum decision of the South Dakota Circuit Court, Sixth Judicial Circuit, is not reported but appears in the Appendix (A - 20). The August 13, 1984, memorandum decision of the South Dakota Circuit Court, Sixth Judicial Circuit, is not reported but appears in the appendix (A - 93). The July 26, 1983, memorandum decision of the South Dakota Circuit Court, Sixth Judicial Circuit, is not reported but appears in the Appendix (A - 52). The August 30, 1982, memorandum opinion of the Secretary of Revenue for the State of South Dakota is not reported but appears in the Appendix (A - 65).

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JURISDICTIONAL STATEMENT

The decree of the South Dakota Supreme Court of which Petitioner seeks review was entered on February 11, 1987. Petitioner

timely filed a petition for rehearing with the South Dakota Supreme Court. The South Dakota Supreme Court entered its Order Denying Rehearing on March 18, 1987. This Petition was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. United States Constitution, Amendment V:

> No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia when in actual service, in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled, in any criminal case, to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

2. United State Constitution, Amendment XIV, Section 1:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States, and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

3. South Dakota Codified Laws Annotated, Section 10-55A-1 (1982):

> A person seeking recovery of tax imposed by chapter 10-39, 10-39A, 10-40, 10-41, 10-43, 10-44, 10-45, 10-46, 10-46A or 10-52 shall follow the procedure established in this chapter. No court has jurisdiction of a suit to recover a tax imposed by chapter 10-39, 10-39A, 10-40, 10-41, 10-43, 10-44, 10-45, 10-46, 10-46A or 10-52 unless the person seeking the recovery of the tax complies with the provisions of this chapter.

4. South Dakota Codified Laws Annotated, Section 10-55A-3 (1982):

> No court may restrain or delay the collection and payment of a tax imposed by chapter 10-39, 10-39A, 10-40, 10-41, 10-43, 10-44, 10-45, 10-46, 10-46A or 10-52. A person shall pay the taxes when due and

may seek recovery as provided in this chapter.

STATEMENT OF THE CASE

The South Dakota Supreme Court has determined that Petitioner Bayer is a bookmaker. In 1981, Bayer obtained a state sales tax license for a service business in the area of amusements. Bayer initially contended that only the vigorish, or the service fee portion of the money he received in bookmaking transactions, was subject to South Dakota's retail sales and service tax, S.D. Codified Laws Ann. § 10-45-4 (1982). The South Dakota Department of Revenue (Department) contended that the entire amount of a lost wager paid by a bettor to a bookmaker was subject to the tax.

Between November 1, 1981, and May 31, 1984, Bayer, in compliance with the assessment method specified by Department made fourteen sales tax payments totalling $55,888.52. All of these payments were paid

under protest, and Bayer sought recovery as provided by statute, S.D. Codified Laws Ann. ch. 10-55A (1982) and S.D. Codified Laws Ann. ch. 10-55 (repealed 1981).

After an administrative hearing on March 22, 1982, the Secretary of Department denied Bayer's petition for a refund of taxes paid under protest. The South Dakota Circuit Court, Sixth Judicial Circuit, affirmed the Secretary. Both the Secretary and Circuit Court based their decisions on an interpretation of the statutory definitions of "gross receipts," S.D. Codified Laws Ann. 10-45-1(2) (1982), and "service," S.D. Codified Laws Ann. 10-45-1(5) (1982). Both concluded that the vigorish and the wager constituted taxable gross receipts in a bookmaking operation.

The South Dakota Supreme Court reversed the Circuit Court on State Constitutional grounds which neither party had raised. The South Dakota Constitution provides: "The

Legislature shall not authorize any game of chance, lottery or gift enterprise, under any pretense or for any purpose whatever . . ." S.D. CONST. art. III, § 25. The South Dakota Supreme Court held that by licensing bookmaking and subjecting it to the retail service tax, the legislature, contrary to the mandates of the State Constitution, was effectively authorizing a game of chance. Bayer v. Johnson, 349 N.W.2d 447 (S.D. 1984) (A - 40).

After the Supreme Court determined that the Department did not have the power to tax bookmaking, Petitioner sought a judgment from the Circuit Court ordering Department to refund the taxes in issue. The Circuit Court refused to order the refund without a specific determination that the taxes were collected on bookmaking activities and remanded the case for an administrative hearing on this issue. Petitioner's appeal to the South Dakota Supreme Court from this order was

dismissed because the order was not a final, appealable order.

An administrative hearing was then held on May 28, 1985. The remand was consolidated with an initial hearing on Bayer's "Petition for Recovery of Sales Tax Imposed Contrary to the South Dakota Constitution" which included return periods from April 1982, through April 1984. At this hearing, Bayer invoked his privilege against self-incrimination and refused to answer questions which required directly admitting that he was a bookmaker. Bayer also refused to produce documents substantiating his involvement in bookmaking because, although the law in South Dakota was not settled, it had recently appeared that bookmaking may constitute a criminal offense under the South Dakota criminal gambling statute, S.D. Codified Laws Ann. § 22-25-1 (1979).

The Secretary failed to issue an order after the May 28, 1985, hearing, but an

adverse ruling to Bayer was implied by the Secretary's failure to accept or deny Bayer's proposed findings of fact and conclusions of law. The circuit court then dismissed Bayer's consolidated appeal from the implied adverse ruling on the basis that the evidence presented at the May 28, 1985, hearing was speculative as to whether the taxes paid under protest by Bayer to the Department came from bookmaking.

On appeal, the South Dakota Supreme Court held that Bayer validly invoked his privilege against self-incrimination during the administrative hearing. The Court also held that since it had determined in the first appeal that the sales tax Bayer paid under protest was based on his business as a bookmaker, that issue was settled pursuant to the law of the case doctrine, and that the circuit court erroneously determined that the evidence on that issue was speculative.

Bayer v. Johnson, 400 N.W.2d 884 (S.D. 1987) (A - 3).

The Court, however, then held that based on public policy, Bayer is denied access to the courts to recover the taxes paid under protest because Bayer had paid these taxes as a result of his engaging in "unconstitutional and possibly criminal activity." Id. at 886. Neither party had ever raised this issue, and neither the circuit court nor the Secretary had ever addressed this issue at any stage of the proceedings.

Bayer timely petitioned the South Dakota Supreme Court for rehearing. (A - 71). In his petition for rehearing, Bayer contended that the court's refusal to allow him access to the courts deprived him of due process of law. Bayer also contended that the court was without jurisdiction to raise the public policy issue sua sponte and that he was entitled to an opportunity to address this

issue. The court denied Bayer's petition for rehearing on March 18, 1987. (A - 70).

JURISDICTION TO REVIEW THE SOUTH DAKOTA SUPREME COURT'S JUDGMENT ON WRIT OF CERTIORARI

After deciding sua sponte that public policy considerations justify denying Bayer access to the courts to seek recovery of the taxes paid under protest, the South Dakota Supreme Court stated, "Although our rationale is different than the trial court, we affirm its judgment." Bayer v. Johnson, 400 N.W.2d 884, 887 (S.D. 1987). (A - 11).

Upon receipt of the court's decision to deny Bayer access to the courts, Bayer filed a timely petition for rehearing with the South Dakota Supreme Court on March 2, 1987. (A - 71). The petition requested rehearing on the grounds that "the Court's refusal to allow Bayer access to the courts to recover sales tax paid on bookmaking activities constitutes a denial of his constitutional rights under the Fifth and Fourteenth

Amendments to the United States Constitution. . . ." (A - 73). On March 18, 1987, the South Dakota Supreme Court denied Bayer's Petition for Rehearing without issuing an opinion. The Order Denying Rehearing stated that it appeared that no issue or question of law or fact had been overlooked or misapprehended in the court's decision. (A - 70).

In Brinkerhoff-Faris Trust & Saving Co. v. Hill, 281 U.S. 673 (1930), the United States Supreme Court granted certiorari in an action where the petitioner first raised a federal claim in a petition for rehearing in the state supreme court. The petition for rehearing stated that the state supreme court violated the due process clause of the Fourteenth Amendment by applying a new construction of a state statute and refusing relief to the petitioner and taxpayer for the taxpayer's failure to seek an administrative remedy previously unavailable to the

taxpayer. The state supreme court denied the petition for rehearing without opinion. This Court held that the federal claim was timely made since it was raised at the first opportunity. See also Aetna Life Ins. Co. v. Lavoie, 106 S.Ct. 1580 (1986).

In the case at hand, the State Supreme Court rendered an unexpected decision in denying Bayer access to the courts to recover taxes paid under protest. Denial of access to the courts due to public policy concerns was not an issue in the first appeal, Bayer v. Johnson, 349 N.W.2d 447 (S.D. 1984). (A - 40). After the South Dakota Supreme Court held in Bayer v. Johnson, id., that the Department lacked the power to tax bookmaking, a magistrate judge vacated Bayer's 1981 conviction for failure to file sales and service tax returns related to Bayer's bookmaking activities and ordered Department to refund the $45,407.56 Bayer had paid pursuant to a plea bargain entered into

between Bayer and the State prior to conviction.

In State v. Bayer, 378 N.W.2d 223 (S.D. 1985), the South Dakota Supreme Court held that the magistrate court was without jurisdiction to order the monies paid to Department returned to Bayer because of the exclusive remedy for recovery of sales tax provided by S.D. Codified Laws Ann. ch. 10-55 (repealed 1981) and S.D. Codified Laws Ann. ch. 10-55A (1982). The South Dakota Supreme Court, in this opinion, again gave no indication that it would rule that public policy justified denying Bayer the opportunity to pursue the statutory remedy for recovery of sales tax and in fact implied that Bayer would have been entitled to a refund if he had followed the administrative procedure established by South Dakota statute.

Bayer raised his federal question at the first opportunity by timely petitioning the

State Supreme Court for a rehearing in Bayer v. Johnson, 400 N.W.2d 884 (S.D. 1987). Based on the record of this case, this Court has jurisdiction to review the 1987 judgment of the South Dakota Supreme Court.

REASONS FOR GRANTING THE WRIT OF CERTIORARI

I.

THE SOUTH DAKOTA SUPREME COURT HAS ADJUDICATED PETITIONER'S RIGHTS IN A MANNER WHICH VIOLATES THE UNITED STATES CONSTITUTION AND IS IN CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT.

A. Introduction.

This case presents the issue of whether a state supreme court deprives a taxpayer of his due process rights when the court determines sua sponte that public policy reasons justify denying the taxpayer access to the state courts to pursue his statutory remedy in recovering taxes paid under protest on bookmaking transactions. Petitioner Bayer contends that the South Dakota Supreme Court's decision denying him access to the

courts violated the United States Constitution and is in conflict with decisions of this Court. For these reasons, Bayer requests that this Petition for Certiorari be granted.

B. The Denial of Remedy Constitutes a Taking of Property Without Due Process of Law.

This Court has long recognized that a taxpayer may recover taxes illegally assessed and paid if the taxpayer causes the collector to understand that the taxes are regarded as illegal and that the taxpayer will act to compel a refund. Erstine v. Van Arsdale, 82 U.S. 75 (1872). This Court has also recognized that a state or an agency of the state acts arbitrarily and without due process of law when it collects taxes by coercion and without authority and then refuses to pay back the taxes to the taxpayer. Ward v. Board of County Comm'rs, 253 U.S. 17 (1920). See also Miller Bros. Co. v. Maryland, 347 U.S. 340 (1950); Atchison, Topeka & Santa Fe

Ry. Co. v. O'Connor, 223 U.S. 280 (1912); Arkansas Bldg. & Loan Ass'n v. Madden, 175 U.S. 269 (1899).

In South Dakota, the State Legislature has provided a remedy for a taxpayer to recover an illegal or overpaid tax. S.D. Codified Laws Ann. ch. 10-55A (1982), establishes a procedure whereby a taxpayer seeking recovery of taxes pays the taxes when due and files a claim for recovery within one year of the date the taxes were paid. The taxpayer receives an administrative hearing and may seek judicial review of an adverse decision from the administrative body. This procedure is the exclusive remedy for recovery of taxes. State v. Bayer, 378 N.W.2d 223 (S.D. 1985).

Bayer complied with the provisions of S.D. Codified Laws Ann. ch. 10-55A (1982) and S.D. Codified Laws Ann. ch. 10-55 (repealed 1981), and is not contesting the constitutionality of these statutes. Rather, Bayer

contends that the South Dakota Supreme Court denied him due process of law in denying him the right to recover sales tax pursuant to these statutes.

The federal guaranty of due process of law extends to state action through the judicial as well as through the legislative, executive or administrative branches of government. Brinkerhoff-Faris Trust & Savings Co. v. Hill, 281 U.S. 673 (1930). In Brinkerhoff-Faris Trust & Savings Co. v. Hill, id., a taxpayer brought suit in a Missouri court to enjoin a county treasurer from collecting taxes assessed against him. The Supreme Court of Missouri denied the taxpayer relief because the taxpayer did not seek an administrative remedy which, in fact, was never available. This Court held that the Supreme Court of Missouri, by denying the taxpayer the only remedy available for the enforcement of its right to prevent the seizure of its property, deprived the

taxpayer of its property without due process of law. In so holding, the Court stated, "Whether acting through its judiciary or through its Legislature, a state may not deprive a person of all existing remedies for the enforcement of a right which the state has no power to destroy, unless there is, or was, afforded to him some real opportunity to protect it." 281 U.S. at 682.

In Bayer's first appeal, Bayer v. Johnson, 349 N.W.2d 447 (S.D. 1984) (A - 40), the court held that the State had no authority to tax bookmaking activities. Bayer having complied with the statutory provisions for recovery of taxes paid under protest had a right to recover the taxes. By denying Bayer access to the courts and an opportunity to protect this right, the South Dakota Supreme Court deprived Bayer of his property without due process of law.

C. By Raising the Public Policy Issue Sua Sponte the State Supreme Court

Unconstitutionally Denied Bayer Access to the Courts Contrary to Due Process.

Due process requires that an individual be granted an opportunity for a hearing at a meaningful time and in a meaningful manner prior to being deprived of any property interest. Boddie v. Connecticut, 401 U.S. 371 (1971); Armstrong v. Manzo, 380 U.S. 545 (1965); Mullane v. Central Hanover Bank & Tr. Co., 339 U.S. 306 (1950). The essence of a hearing "demands that he who is entitled to it shall have the right to support his allegations by argument, however brief; and, if need be, by proof, however informal." Londoner v. Denver, 210 U.S. 373, 386 (1908), quoted in Memphis Light Gas & Water Div. v. Craft, 436 U.S. 1, 43 n. 17 (1978).

The South Dakota Supreme Court raised the issue of public policy sua sponte in Bayer v. Johnson, 400 N.W.2d 884 (S.D. 1987), (A - 3). Since the Court had denied Bayer's request for oral argument in that appeal,

Bayer never had the opportunity to present argument on the public policy issue prior to judgment being handed down against him.

The South Dakota Supreme Court based its public policy determination on its conclusions that bookmaking is unconstitutional and possibly illegal. The court relied on South Dakota case law in which the courts refused to lend their aid to plaintiffs whose claim or right to recover depended on a transaction deemed malum in se or prohibited by statute. (A - 11). As the dissent points out, the majority's rationale is faulty since the South Dakota Constitution does not declare bookmaking illegal or unconstitutional, but merely prohibits the legislature from authorizing such activity. The dissent further points out that the cases relied upon by the majority involve transactions that were in and of themselves illegal, while the underlying transaction in

the case at hand involves payment of taxes. (A - 17, 18).

Bayer was entitled to present argument regarding the public policy issue. The public policy rationale of the majority is without fair and substantial support. As such, the court's decision is not based on valid state grounds so as to defeat the jurisdiction of this Court. Wolfe v. North Carolina, 364 U.W. 177 (1960); National Ass'n for the A.C.P. v. Alabama, 357 U.S. 449 (1958); Ward v. Board of County Comm'rs, 253 U.S. 17 (1920). As such, this public policy decision should not be allowed to deprive Bayer of property without due process of law without Bayer first having an opportunity to address the issue of public policy.

D. Refusing Bayer a Tax Refund, In Effect, Constitutes a Forfeiture.

In his petition for rehearing, Bayer, citing United States v. U.S. Coin & Currency, 401 U.S. 715 (1920), argued that the court's

decision denying him access to the courts for public policy reasons operated, in effect, as a forfeiture. In United States v. U.S. Coin & Currency, id., this court, in deciding the case on other grounds, declined to decide the case on the issue of whether the forfeiture statute in issue violated the Fifth Amendment. The Court stated, however, that when the federal forfeiture statutes are viewed in their entirety, they obviously intend to impose a penalty only upon those significantly involved in a criminal enterprise.

The South Dakota Legislature has provided that a conviction for a public offense will not work a forfeiture except where a forfeiture is expressly imposed by law. S.D. Codified Laws Ann. §23A-27-2 (1979). Although the South Dakota Supreme Court conceded that "it is not completely clear whether bookmaking would be a criminal offense under the South Dakota Code," (A -

8), the court concluded that the nature of Bayer's occupation justified denying him a remedy to recover taxes the State had no power to collect.

In United States v. One 1936 Model Ford, 307 U.S. 219 (1939), this Court opined that forfeitures are not favored and should be enforced only when within both the letter and spirit of the law. There was no authority for a forfeiture in the case at hand. The decision of the South Dakota Supreme Court operated as an unconstitutional taking of Bayer's property. In addition, even if a forfeiture were authorized, the due process requirements of the Fourteenth Amendment were not met because the court in raising the public policy issue sua sponte did not give Bayer notice and an opportunity to present his objections. See Robinson v. Hanrahan, 409 U.S. 38 (1972).

CONCLUSION

The South Dakota Supreme Court, without

fair and substantial support, determined sua sponte that public policy justified denying Bayer access to the courts to recover taxes paid under protest by him on bookmaking activities. Both the result of this determination and the manner in which this determination was made violate Bayer's rights of due process. The decision of the South Dakota Supreme Court is also in conflict with applicable decisions of this Court. For these reasons, Bayer respectfully requests that this Court grant his Petition for Certiorari.

Dated this 15th day of June, 1987.

HAGEN & WILKA, P.C.

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APPENDIX

APPENDICES

APPENDIX A

IN THE SUPREME COURT OF THE
STATE OF SOUTH DAKOTA
#15224

BARRY E. BAYER,
Petitioner and Appellant,

v.

R. VAN JOHNSON, Secretary of Revenue
for the State of South Dakota,
Respondent and Appellee.

Submitted on briefs May 21, 1986

Opinion Filed February 11, 1987

WUEST, Chief Justice

Appellant Barry E. Bayer (Bayer) appeals the decision of the trial court in which he was denied a refund of certain sales taxes paid under protest. We affirm.

Bayer applied for and received a retail occupational sales tax license in July, 1981. This license was issued for a service business in the area of amusements. Included in this amusements category are the services of "bookies" and "bookmakers, race." Pursuant to this license, Bayer paid various amounts of sales tax from November, 1981, through April of 1982 under protest. That

dispute concerned how much of the money received by Bayer in his bookmaking business was to be considered "gross receipts." SDCL 10-45-1(2). State claimed the entire amount of a lost wager paid by a bettor to a bookmaker is included in the gross receipts without any offset for the losses of the bookmaker. Bayer contended, however, that only his 'vigorish' or his service fee was subject to sales tax. That issue was appealed to this court. This court, however, declined to consider that issue and instead noted that since games of chance are prohibited by the South Dakota Constitution under article III, §25, the State thus has no power to implicitly authorize bookmaking activities by taxing them. Bayer v. Johnson, 349 N.W.2d 447 (S.D. 1984)(Bayer I). See also SDCL 10-45-9.

In Bayer v. State, 378 N.W.2d 223 (S.D. 1985) (Bayer II), Bayer sought to recover $46,000 in back taxes previously paid through the magistrate court for Minnehaha County,

Second Judicial Circuit, as part of a plea bargain on three felony charges of failure to file sales and service tax returns on his bookmaking receipts. In Bayer II, we affirmed the circuit court judgment reversing the magistrate's attempt to order a refund of the money paid as part of the plea bargain. Writing for the Court, then Chief Justice Fosheim, after rejecting the magistrate's authority to refund the money under the guise of correcting an illegal sentence under SDCL 23A-31-1, stated: "Our legislature has provided an exclusive means for recovery of sales taxes paid and requires that jurisdiction is absent if the procedure established is not strictly followed." Bayer II, 378 N.W.2d at 224.

Following this decision, a hearing was held before the Department of Revenue (Department) concerning Bayer's request for refund of sales taxes paid. By stipulation of both parties, this hearing also included additional return periods from April 1982

through April, 1984. After hearing, Department failed to issue an order concerning Bayer's petition for refund. From the failure of Department to enter an order, Bayer appealed. The trial court, however, dismissed Bayer's appeal. It ruled:

> Bayer has refused to provide adequate information to assist either the Secretary or this court in making a full and complete determination as to what portions of the tax funds were unconstitutional collections. . . . It continues to be speculative so far as the evidence is concerned whether or not the money paid to Department came from gambling. Bayer, through his counsel, argues all around the point and makes assertions that this is the case. However, as this court has previously noted, such speculation or supposition cannot be the basis for ordering a tax refund.

In the most recent hearing before the Secretary of Revenue, following this court's reversal in Bayer I, supra, Bayer refused to produce documents substantiating his involvement in bookmaking and invoked his Fifth Amendment right against self-incrimination when asked questions involving bookmaking.

Through his testimony, Bayer did, however, claim that the sales tax payments made under protest were paid under a license obtained for the area of amusements. SDCL 10-45-5.2 provides that the services enumerated under major group 79 (amusement and recreation services) in the Standard Industrial Classification Manual 1972 are subject to the retail sales and service tax levied by SDCL ch. 10-45. Bookmakers are included within major group 79. At the hearing before the Department, Bayer was questioned regarding each separate category listed under major group 79. He testified that each of the categories listed were not the basis upon which he paid the sales taxes, except for categories enumerated "bookies" and "bookmakers, race." He declined to answer inquiries regarding whether or not taxes were paid for these activities based upon his Fifth Amendment privileges.

Bayer initially contends that the trial court erred in finding that there was

insufficient evidence to show that Bayer paid the taxes under protest on an unconstitutional activity, that being bookmaking. As noted above, Bayer invoked his Fifth Amendment privilege against self-incrimination when asked whether he paid sales taxes upon bookmaking. This he could validly do.

> Although a taxpayer may validly invoke the Fifth Amendment privilege against self-incrimination, he may not be the sole judge of whether certain material is incriminating. A court must determine whether the taxpayer is justified in remaining silent. Where the danger of self-incrimination is not readily apparent, the claimant of the privilege has the burden of proving the danger exists. Any danger of incrimination must be real and substantial and not merely remote or speculative.

Baskin v. United States, 738 F.2d 975, 977 (8th Cir. 1984) (citations omitted).

While it is not completely clear whether bookmaking would be a criminal offense under the South Dakota Code, see SDCL 22-25-1, given, however, the import of our decision in Bayer I, supra, Bayer was under a "real and

substantial danger of incrimination". See Baskin, supra. Thus, it was appropriate for him to invoke his Fifth Amendment privilege during the hearing on his petition for a sales tax refund.

In Bayer I, supra, this court stated: "Appellant candidly states he is engaged in the bookmaking business and the facts seem essentially undisputed." 349 N.W.2d at 448. Thus, for purposes of that appeal, this court determined that Bayer was involved in the bookmaking business.

The law of the case doctrine is used to provide finality to an issue once it has been determined by a court of record. Once an issue is litigated and decided, it remains settled throughout any subsequent litigation revolving around that issue. See American State Bank v. List-Mayer, 350 N.W.2d 44 (S.D. 1984).

> 'It is a fundamental principle of jurisprudence that material facts or questions which were in issue in a former action, and were there admitted or judicially determined,

> are conclusively settled by a judgment rendered therein, and that such facts or questions become res judicata and may not again be litigated in a subsequent action.'

Callahan v. Prewitt, 13 N.W.2d 660, 662 (Neb. 1944) (quoting 30 Am. Jr. § 178, at 940). Thus, we hold that this court's disposition in Bayer I, supra, settled the question of fact regarding that Bayer's sales taxes paid under protest were based upon his business as a bookmaker. Since the payments were made upon an unconstitutional activity, we hold Bayer cannot recover.

We base our decision upon public policy holding Bayer is denied access to the courts to recover these taxes paid to engage in an unconstitutional and possibly criminal activity. Our rationale is stated in Jasper v. Rossman, 73 S.D. 222, 226, 41 N.W.2d 310, 312 (1950), wherein we said:

> In the case of Ferguson v. Yunt, 13 S.D. 120, 82 N.W. 509, 510, this court said: 'Courts do not lend their aid to parties engaged in transactions in violation of law, and betting and gambling contracts are uniformly

> held to be contrary to the policy of the law, and illegal." 'The test to determine whether the plaintiff is entitled to recover', said the court in that case, 'is his ability to establish his case without any aid from the illegal transaction. If his claim or right to recover depends upon a transaction which is malum in se, or prohibited by legislative enactment, and that transaction must necessarily be proved to make out his case, there can be no recovery.' The general rule that the law will not aid either party has been applied to illegal transactions other than gambling. E.P. Wilbur Trust Co. v. Fahrendorf, 64 2.d. 124, 265 N.W. 1; Bartron v. Codington County, 68 S.D. 309, 2 N.W.2d 337, 140 A.L.R. 550; Beverage Co. v. Villa Marie Co., 69 S.D. 627, 13 N.W.2d 670. The defense of illegality prevails, not as a protection to the defendant, but as a disability in plaintiff. The reasons for refusing the aid of the court become even stronger when the property is liable to proceedings by the state to enforce a forfeiture.

Although our rational is different that the trial court, we affirm its judgment.

SABERS, Justice, and FOSHEIM, Retired Justice, concur.

MORGAN and HENDERSON, Justices, dissent.

MILLER, Justice, not have been a member of the Court at the time this action was submitted to the Court, did not participate.

MORGAN, Justice (dissenting).

I dissent.

The first chapter of Mr. Bayer's travails involving sales tax actually began in 1981 when he was hailed into magistrate court in Sioux Falls charged with three felony violations of failure to file sales and service tax returns relating to his bookmaking business. SDCL 10-45-49.1. He entered into a plea bargain agreement, adopted by the court, whereby he was given probation upon the conditions: (1) That he pay $62,500 in back taxes, penalties and interest: (2) that he adopt appropriate sales tax record-keeping procedures; and (3) that he have no further violations of SDCL ch. 10-45. Bayer apparently complied with the conditions to the extent that he applied for and received a sales tax license. He

also paid some $46,000 of the $62,000 determined as back taxes, penalties and interest.

A dispute arose with the Secretary of the Department of Revenue (Department) as to whether the tax was to be computed on the total sums bet or, as Bayer urged, upon only the "vigorish" or service fee charged the bettor. Bayer appealed Department's determination and it came before this court via the administrative appeals route in Bayer v. Johnson, 349 N.W.2d 447 (S.D. 1984). The majority has denominated that decision as Bayer I, although it is the second chapter in the Bayer saga. The majority decision in Bayer I determined that bookmaking was an activity prohibited by Article III, section 25 of the South Dakota Constitution and the state was precluded from applying sales tax licensing requirements to gambling activities which are prohibited by the constitution. Bayer I, 349 N.W.2d at 450.

As a result of our decision in Bayer I, Bayer sought to recover the money paid under

the mandate of the magistrate court in the criminal proceedings first noted above. The magistrate attempted to order the sums returned, but the circuit court reversed the order on appeal, based on Bayer's failure to pay the tax under protest. On appeal to this court in State v. Bayer, 378 N.W.2d 223 (S.D. 1985) (Bayer II) we affirmed the circuit court's decision on two grounds: (1) That our legislature has provided an exclusive means for recovery of sales tax paid (payment under protest and suit to recover and jurisdiction is absent if the procedure established is not strictly followed; and (2) that Bayer failed to appeal the conditions of probation imposed by the magistrate court.

In this action, Bayer seeks to recover certain tax payments made under protest in the interim between the magistrate's decision in 1981 and our decision in Bayer I in 1984. He made application to Department under SDCL 10-45-53, and upon Department's denial of his petition, the administrative appeal route was

followed. The circuit court expanded the proceedings to include some payments not originally incorporated in the application for refund. The circuit court affirmed Department and this appeal to our court followed.

I view the grounds upon which Department denied Bayer's claim to be shabby, at best. As the majority opinion so ably points out, because of our decision in Bayer I, Bayer was under a real and substantial danger of incrimination. Further, Bayer I settled the question of fact that Bayer's tax payments were based on his business as a bookmaker. The pretense under which Department and the circuit court acted should be reversed.

It is at this point that the otherwise well-written and logical majority opinion loses me completely. The majority states: "Since the payments were made upon an unconstitutional activity, we hold Bayer cannot recover." What unconstitutional activity are we talking about? I agree that Bayer's

bookmaking activity falls within the classification of games of chance which the legislature is forbidden to approve under Article III, section 25 of the South Dakota Constitution. I point out that the exaction of a sales tax on bookmaking activities is the unconstitutional activity we struck down in Bayer I: "If it be the will of the people to license, tax and thus authorize privately operated games of chance, that likewise requires further amendment. It cannot be done by the legislature." 349 N.W.2d at 450. The constitution does not declare bookmaking illegal or unconstitutional. It prohibits the legislature from authorizing such activity. That is what constitutions are for. They are grants of authority to the legislature or limitations thereon. It rings a little hollow to piously say that we deny access to the courts to Bayer for his so-called unconstitutional activity, but thereby protect the unconstitutional activity of the

State in collecting illegal taxes with the aid and assistance of our lower court.

The cases cited as rationale supporting the majority opinion are clearly distinguishable from this case. They all involve transactions that were in and of themselves illegal. In Jasper v. Rossman, 73 S.D. 222, 41 N.W.2d 310 (1950), the suit was for the balance due on a sale of gambling equipment (punchboards). In Ferguson v. Yunt, 13 S.D. 120, 82 N.W. 509 (1900), the suit was to recover on the bond of a stakeholder of a horse-racing bet. E.P. Wilbur Trust Co. v. Fahrendorf, 64 S.D. 124, 265 N.W. 1 (1936), involved a suit to recover on a note executed under the inducement of an agreement not to prosecute for alleged embezzlement. In Bartron v. Codington County, 68 S.D. 309, 2 N.W.2d 337 (1942), the suit was for recovery for services and supplies furnished indigents under a contract between the county and a professional corporation of physicians when it was illegal for physicians to incorporate.

And finally, Beverage Co. v. Villa Marie Co., 69 S.D. 627, 13 N.W.2d 670 (1944), was for recovery on an illegal transaction for the sale of saloon equipment by a beer distributor to a retail outlet. The transaction involved in the case before us is the payment of taxes. The payment of taxes, burdensome as it may seem sometimes, is hardly an illegal transaction. True, we said in Bayer I that it was unconstitutional for the legislature to impose a sales tax on bookmaking. We did not say, however, that it was either unconstitutional or illegal to pay the tax.

Finally, I note some language in Jasper, supra: "The defense of illegality prevails, not as a protection to the defendant, but as a disability in plaintiff. The reasons for refusing the aid of the court become even stronger when the property is liable to proceedings by the state to enforce a forfeiture." 73 S.D. at 226, 41 N.W.2d at 312. Again, I point out that the payment of taxes

is not illegal, nor is the tax money liable to forfeiture.

I am authorized to state that Justice Henderson joins in this dissent.

APPENDIX B

STATE OF SOUTH DAKOTA) IN CIRCUIT COURT
)
COUNTY OF HUGHES) SIXTH JUDICIAL CIRCUIT

****

BARRY E. BAYER, Civ. 82-430

Petitioner and Appellant,

-vs- Memorandum Decision

R. VAN JOHNSON, SECRETARY OF REVENUE FOR THE STATE OF SOUTH DAKOTA,

Respondent and Appellee

****

This case involves the consolidated appeals of the petitioner, Barry E. Bayer (Bayer) from an administrative hearing held before R. Van Johnson, Secretary of the Department of Revenue (Secretary). Bayer moves this Court for an order directing the Secretary to enter a judgment awarding Bayer an amount representing the sales tax which Bayer paid under protest together with pre-judgment interest. The Department of Revenue (Department) moves this Court for an order dismissing the consolidated appeals of

Bayer for his failure to comply with the previous order of this Court and Court's Memorandum Decision dated April 13, 1984.

PROCEDURAL HISTORY

On November 2, 1981 Bayer filed a Petition for Recovery of Sales Tax Paid Under Protest for the period July, August and September, 1981, and a Petition for Recovery of Sales Tax Paid Under Protest for the period October, November and December, 1981.

The Secretary, in accordance with the protest statutes, held the contested case hearing on March 22, 1982. The Secretary denied Bayer's Petition for Recovery of Sales Tax Paid Under Protest for the third and fourth quarters of 1981. Bayer appealed that order to this Court. The appeals were consolidated by stipulation and order with a Petition for Recovery of Sales Tax Paid Under Protest on March 2, 1982, for the period January, February and March of 1982. This Court sustained the determination of the

Secretary, which denied the petition for refund.

Bayer then appealed this Court's determination to the South Dakota Supreme Court on August 11, 1983. The Supreme Court reversed and remanded the case back to this Court. The Supreme Court held in Bayer v. Johnson, 349 N.W.2d 447 (S.D. 1984), that the licensing of bookmaking as a service subject to the retail service tax by the State Legislature was in effect authorizing a game of chance and treating it as a legitimate source of revenue which cannot be reconciled with Article 3, Section 25 of the South Dakota Constitution.

Upon remand and after hearing, this Court remanded the matter on August 13, 1984 to the Department of Revenue for the purpose of determining whether receipts from businesses other than bookmaking were included in the gross receipt tax returns filed by Bayer.

A hearing was held on remand on May 28, 1985 before R. Van Johnson, Secretary of Department. Upon agreement of the parties, the remand was consolidated with an initial hearing on Petition for Recovery of Sales Tax imposed for the period April, 1982 through April, 1984, which was filed in September, 1984. The Department subpoenaed Bayer's records in an effort to comply with the Court's order. On the advise of his counsel, Bayer exercised his Fifth Amendment right against self-incrimination in response to eleven separate questions and refused to produce the requested documents.

Bayer submitted proposed findings of fact and conclusions of law and a proposed consolidated judgment on June 28, 1985. The Secretary neither accepted nor denied the proposed findings and failed to issue an order in the present case. Bayer then submitted his consolidated notice of appeal to this Court on July 24, 1985. The consolidated appeal includes the sales tax periods

previously before this Court, as well as the period included in the petition for refund filed in September, 1984. Pursuant to SDCL 1-26-30.1, the proposed findings and proposed order were impliedly denied by the agency's failure to act. It is from this adverse decision of the Secretary that Bayer now appeals.

FACTS

A Retail Occupational Sales Tax License was issue to Bayer on July 24, 1981. This license was issued for a service business in the area of amusements. A license in the area of amusements is classified under Major Group 79 of the Office of Management and Budget Industrial Classification Manual. This manual is incorporated by reference in SDCL 10-42-5.1. Included in Major Group 79 list of services are "bookies" and "book-maker's race". Sales tax was paid by Bayer under this license on the dates and in the amounts as follows:

November 2, 1981 $11,167.40

February 2, 1982	$26,426.67
May 2, 1982	$ 1,983.75
July 31, 1982	$ 816.25
October 30, 1982	$ 1,577.45
January 30, 1983	$ 2,458.05
April 29, 1983	$ 1,403.42
July 3, 1983	$ 2,377.77
October 2, 1983	$ 781.31
November 30, 1983	$ 2,332.42
January 31, 1984	$ 2,301.80
January 16, 1984	$ 281.87
March 31, 1984	$ 636.16
May 31, 1983	$ 1,344.20

Bayer paid the sales tax under protest and filed a request for refund with each payment.

As previously indicated, Bayer refused to produce the subpoenaed documents and on eleven separate occasions claimed his Fifth Amendment right at his most recent hearing before the Secretary. Bayer did, however, testify that the business for which the sales tax payments in question were paid was properly classified as an amusement. In addition, Bayer testified that the activity for which he obtained the sales tax license did not have anything to do with the following sub-groups of Major Group 79:

Group 791, Dancehalls, studios and schools;
Group 792, Theatrical producers;

Group 793, Bowling alleys, billiard and pool establishments;
Group 794, Commercial sports;
Group 7992, Public golf courses
Group 7993, Coin operated amusement devices;
Group 7996, Amusement parks; or
Group 7997, Membership sports and recreation clubs.

Bayer also testified with regard to Group 7999 that the activity reflected in the sales tax license did not have anything to do with the sub-groups from aerial tramways through boats, party fishing, or from botanical gardens through zoological gardens.

DECISION

Counsel for Bayer argues that by the process of elimination, it should be clear to the Secretary and to this Court that the sales tax paid by Bayer under his "amusements" sales tax license was solely based on receipts from Bayer's bookmaking or bookmaker's race business.

As this Court has previously stated in its Memorandum Decision dated August 13, 1984, the assumption that Bayer is a bookmaker without other evidence is an

insufficient basis upon which to adjudicate the total refund of the sales tax. The Court refuses to engage in this type of speculation.

In view of the Supreme Court's ruling in Bayer v. Johnson, 349 N.W.2d 447 (S.D. 1984), it is obvious to this Court that if the receipts were in fact from a bookmaking operation, they are not taxable. It is equally obvious, that if the receipts are not from bookmaking but rather from some other constitutional legal endeavor, they are taxable. Unfortunately, Bayer has refused to provide adequate information to assist either the Secretary or this Court in making a full and complete determination as to what portions of the tax funds were constitutionally collected and what portions were unconstitutional collections.

In actions to recover taxes paid under protest, the burden of proof is on the taxpayer to show that he has a tax refund coming. Bayer, by his refusal to answer

questions or to provide documentary evidence, has failed to meet this burden. Bayer has also failed to comply with the Court's order which incorporated the Memorandum Decision dated August 13, 1984.

It continues to be speculative so far as the evidence is concerned, whether or not the money paid to Department came from gambling. Bayer, through his counsel, argues all around the point and makes assertions that this is the case. However, as this Court has previously noted, such speculation or supposition cannot be a basis for ordering a tax refund.

The Court will grant Department's motion for an order dismissing the consolidated appeal. Given the extensive nature of the proceedings already held and the position that has been taken by Mr. Bayer, this Court sees no reason to hold further hearings on this matter. Counsel for Department is directed to prepare an order consistent with

this opinion granting the motion for dismissal.

Dated this 29th day of October, 1985.

ATTEST:

APPENDIX C

STATE OF SOUTH DAKOTA) :SS		IN CIRCUIT COURT
COUNTY OF HUGHES	)	SIXTH JUDICIAL CIRCUIT
BARRY E. BAYER, Petitioner & Appellant,	)	Civ. 82-430 ORDER
-vs-	)	GRANTING MOTION
R. VAN JOHNSON, SECRETARY OF REVENUE FOR THE STATE OF SOUTH DAKOTA, Respondent & Appellee.	)	TO DISMISS

TO THE ABOVE NAMED PETITIONER/APPELLANT and RESPONDENT/APPELLEE

This Court having remanded this matter to the Department of Revenue for further proceedings following the decision in the case of Bayer v. Johnson, 349 N.W.2d 447 (SD 1984), and

The said hearing having been conducted and the Appellant having failed to comply with this Court's order which incorporated the Memorandum Decision dated August 13, 1984, and

The Respondent/Appellee having moved for dismissal of the consolidated appeal, and the Court being fully advised in the premises:

NOW THEREFORE IT IS ORDERED:

That the consolidated appeals of the Petitioner/Appellant in the above entitled action be, and the same are dismissed.

Dated at Pierre, Hughes County, this 13th day of November, 1985.

ATTEST:

APPENDIX D

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

BARRY E. BAYER,
Petitioner and
Appellant,

-vs-

R. VAN JOHNSON,
Secretary of Revenue
for the State of South
Dakota,
Appellee.

ORDER DISMISSING
APPEAL

#14746

Appellee having served and filed objections to the above-entitled appeal on the ground that the order from which appeal is sought is not a final order, and appellant having served and filed a response thereto, and the Court having considered the objections and response and having determined that the order from which appeal is sought is not a final, appealable order, now, therefore, it is

ORDERED that the above-entitled appeal be and it is hereby dismissed.

DATED at Pierre, South Dakota, this 15th day of November, 1984.

ATTEST:

APPENDIX E

STATE OF SOUTH DAKOTA) IN CIRCUIT COURT
:SS
COUNTY OF HUGHES) SIXTH JUDICIAL CIRCUIT

BARRY E. BAYER,) Civ. 82-430
Petitioner &
Appellant,)

-vs-) MEMORANDUM DECISION
R. VAN JOHNSON,
Secretary of Revenue)
for the State of South
Dakota,)
Respondent and
Appellee.)

This is the continuation of an action instituted by Petitioner to obtain a refund from Respondent of sales taxes paid under protest. Respondent denied the refund, this Court affirmed that denial, and the South Dakota Supreme Court reversed. At this state in the proceedings, Petitioner is asking for a judgment from this Court ordering Respondent to refund the sales tax paid under protest.

PROCEDURAL HISTORY AND FACTS

On June 13, 1984 the South Dakota Supreme Court held that the South Dakota State Legislature could not impose a tax on

an activity that was expressly unconstitutional because to do so, would be "an implicit, if not formal recognition" by the Legislature of an unconstitutional activity. Bayer v. Johnson, 349 N.W.2d 447, 449 (S.D. 1984). The Supreme Court based their decision on a constitutional issue that was neither raised nor argued to either Respondent or to this Court. In basing its decision on the constitutional issue raised sua sponte, the Supreme Court did not decide the issue presented to Respondent and to this Court involving the method of assessment questions (i.e. taxation of the total gross receipts from wagering vs. taxation of the vigorish only).

On July 20, 1984 Petitioner submitted proposed judgments to this Court which would require Respondent to refund the sales tax paid under protest. Petitioner is asking for the refund based on the Supreme Court's decision that the collection of the tax would

be a legislative recognition of the unconstitutional activity.

On July 27, 1984 Respondent filed an objection to the form of judgment, an affidavit, and a petition for order and a motion to compel Petitioner to produce a list of names and addressed of persons who placed money at risk with Petitioner during the time frame involved. Respondent also moved this Court for an order which would have allowed for the notification to the State's Attorneys in the counties concerned for the purpose of allowing them to commence an action against Petitioner under SDCL 21-6-2. Respondent contended that the tax money should be placed in a constructive trust for the benefit of wives and children of losers, or for the benefit of the public schools.

DECISION

As was stated by Petitioner's counsel at the recent hearing, Petitioner has never admitted to being a bookmaker, although he does possess a federal gambling license. It

was agreed ab initio, however, that it could be assumed for the purposes of the proceedings that he was involved in the bookmaking business. Therefore, in the proceedings before Respondent, this Court and the Supreme Court it has been assumed that Petitioner is a bookmaker and that the gross receipts subject to the tax were from bookmaking operations.

However, Petitioner's current position puts the case in a different posture. It is obvious, in view of the Supreme Court's ruling, that if the receipts were in fact from a bookmaking operation, they are not taxable. It is equally obvious, at least to this Court, that if the receipts were not from bookmaking, but rather from some other constitutional and legal endeavor, they are taxable.

It would appear that Petitioner is involved in various business pursuits. The record is not clear whether a portion of the receipts from businesses other than the

assumed bookmaking venture are included in the gross receipt tax returns herein.

This Court cannot and will not order Respondent to refund taxes to Petitioner without a specific determination that the tax was imposed and collected on an unconstitutional activity. Either the taxes paid by Petitioner were taxes paid on the gross receipts of a constitutional activity or they were paid on an unconstitutional activity. The resolution of this factual question must be made prior to resolving the question of whether Petitioner is entitled to a refund and, if so, the amount thereof.

This Court is of the opinion that an assumption that the petitioner was a bookmaker is insufficient upon which to adjudicate the total refund of the sales tax. If, as he claims, the tax was paid on the gross receipts of a constitutional endeavor, he has the obligation to establish and specify the nature of the business and the amount of the receipts in the specific categories.

Counsel for Respondent is directed to prepare an order consistent with this opinion, incorporating the same therein by reference.

Dated this 13th day of August, 1984.

ATTEST:

APPENDIX F

STATE OF SOUTH DAKOTA) IN CIRCUIT COURT
:SS
COUNTY OF HUGHES) SIXTH JUDICIAL CIRCUIT

BARRY E. BAYER,) Civ. 82-430
Petitioner &
Appellant,) ORDER

-vs-)

R. VAN JOHNSON,)
SECRETARY OF REVENUE
FOR THE STATE OF SOUTH)
DAKOTA,
Respondent &)
Appellee.

This matter having come before the Court as a continuation of action by the Petitioner to obtain a refund of sales tax paid under protest and a hearing having been held and this Court having entered a Memorandum Decision dated August 13, 1984, which by reference is incorporated herein, it is

ORDERED that this matter is rendered to the Secretary of Revenue for proceedings consistent with this Court's decision.

Dated this 23rd day of August, 1984.

ATTEST:

APPENDIX G

IN THE SUPREME COURT OF THE
STATE OF SOUTH DAKOTA
#14314

BARRY E. BAYER,
Petitioner and Appellant,

v.

R. VAN JOHNSON, Secretary of Revenue
for the State of South Dakota,
Respondent and Appellee.

Argued April 16, 1984

Opinion Filed June 13, 1984

FOSHEIM, Chief Justice

This is an administrative appeal from a decision of the South Dakota Secretary of Revenue (Secretary) which denied Barry E. Bayer's application for a refund of sales tax paid under protest. The circuit court affirmed the Secretary. We reverse.

Appellant candidly states he is engaged in the bookmaking business and the facts seem essentially undisputed. SDCL 1-45-5.2, by reference, subjects bookmaking to the retail sales and service tax.[1]

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[1]SDCL 10-45-5.2 provides that the services enumerated under major group 79 (amusement and recreation services) in the

Mr. Bayer holds a retail occupational sales tax license for a service business in the area of amusements.

It is also undisputed that as a provider of services a bookmaker is taxed pursuant to SDCL 10-45-4, which reads:

> There is hereby imposed a tax at the same rate as that imposed upon sales of tangible personal property in this state upon the gross receipts of any person from the engaging or continuing in the practice of any business in which a service is rendered. Any service as defined by § 10-45-4.1 shall be taxable, unless the service is specifically exempt from the provisions of this chapter. (emphasis added)

"Gross receipts" means

> the amount received in money, credits, property, or other money's worth in consideration of sales at retail within this state, without any deduction on account of the cost of the property sold,

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Standard Industrial Classification Manual, 1972 (prepared by the Statistical Policy Division of the Office of Management and Budget, Office of the President), are subject to the retail sales and service tax levied by SDCL ch. 10-45. The federal publication, at p. 319, includes bookmakers within the group, "Amusement and Recreation Services."

> the cost of materials used, the cost of labor or services purchased, amounts paid for interest or discounts, or any other expenses whatsoever, nor shall any deduction be allowed for losses . . . (emphasis added)

SDCL 10-45-1(2). "Sales at retail" includes sale of services. SDCL 10-45-1(5).

The dispute concerns how much of the money received by a bookmaker in a bookmaking transaction is to be considered gross receipts. The Secretary claims the entire amount of a lost wager paid by a bettor to a bookmaker is includable in gross receipts, without any offset for losses of the bookmaker. It is the position of appellant that only the "vigorish", or service fee, is subject to the tax.

We perceive no way this issue can be decided without giving tacit approval to that which is constitutionally forbidden. Article III, Section 25 of our state constitution clearly provides: "The Legislature shall not authorize any game of chance, lottery or gift enterprise, under any

pretense or for any purpose whatever. . ."[2] A "game of chance" is a contest wherein chance predominates over skill. Boies v. Bartell, 82 Ariz. 217, 310 P.2d 834 (1957); Indoor Recreation Enterprises, Inc. v. Douglas, 194 Neb. 715, 235 N.W. 2d 398 (1975); Baedaro v. Caldwell, 156 Neb. 489, 56 N.W.2d 706 (1953); 18 Words and Phrases "Game of Chance" (1956).

While the record reveals no evidence of appellant's bookmaking methods, he did establish usual bookmaking practices by the testimony of an expert witness. According to this witness, a bookmaker receives wagers from players, or customers, the outcome of which depends upon the happening of an uncertain event. The occurrence of the event determines which party, the player or the bookmaker, must pay the other an amount specified at the time the wager was placed.

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[2]Certain exceptions are permitted for public-spirited uses. See S.D. Const. Art. III, § 25.

Appellant's witness identified races and athletic events as frequent subjects of bookmaking. The outcome of such events in no way depends upon the skill of the bettors. The wagering is therefore a contest in which chance predominates over skill. Bookmaking is accordingly a "game of chance" which the legislature is constitutionally prohibited from authorizing. Cf. United States v. Thompson, 409 F. Supp. 1044 (D.C. Mont. 1976); State ex rel. Dussault v. Kilburn, 111 Mont. 400, 109 P.2d 1113 (1941) (betting on outcome of athletic event is a "game of chance"); Brandford v. Hurt, 15 F.Supp. 426 (D.C. Tex. 1936) aff'd 84 F2d 722 (5th Cir. 1936) (bookmaking on dog racing is "game of chance" or gambling device within meaning of federal statute outlawing gambling and gambling devices).

In licensing bookmaking as a service subject to a retail service tax, the legislature is effectively authorizing a game of chance and treating it as a legitimate

source of revenue. Requiring service tax licenses and exacting tribute, blind to the activity, is an implicit, if not formal recognition. It cannot be reconciled with Article III, Section 25 of our constitution.

This conclusion can come as no surprise. We recently reaffirmed our long-standing position that, regarding matters of gambling, it is the duty of the courts to pierce any disguise of legitimacy and to ascertain the real activities involved. Bayer v. Burke, 338 N.W.2d 293 (S.D. 1983); Waite v. Frank, 14 S.D. 626, 86 N.W. 645 (1901).

The Secretary seems to justify the tax by arguing that Congress has imposed a tax on income derived from illegal sources, James v. United States, 81 S.Ct. 1052, 366 U.S. 213, 6 L.Ed.2d 246 (1961); Rutkin v. United States, 72 S.Ct. 571, 343 U.S. 130, 96 L.Ed. 833 (1952); United States v. Sullivan, 47 S.Ct. 607, 274 U.S. 259, 71 L.Ed. 1037, 51 A.L.R. 1020 (1927), including

a wagering tax. 26 U.S.C. §4401 et seq. (West Supp. 1984). Federal practice is not analogous. Unlike the South Dakota Constitution, the United States Constitution is silent about whether the Congress may authorize games of chance.

Neither party has challenged the constitutionality of the tax statute involved. We have consistently held that the constitutionality of a statute cannot be raised for the first time of appeal. State v. Williams, 84 S.D. 547, 173 N.W.2d 889 (S.D.1970); Empey v. Rapid City, 78 S.D. 462, 103 N.W. 2d 861 (1960); Tri-State Auto Auction, Inc. v. Ostroot, 76 S.D. 356, 78 N.W.2d 468 (1956). This position has arisen, however, in response to parties who urge it on appeal but who failed to raise the question with the trial court. We have never decided whether this court sua sponte will examine a patent constitutional dilemma not raised by either party.

There is good authority that where the appellate court has jurisdiction on other grounds it may decide a constitutional question on its own motion. City of St. Louis v. Butler Co., 358 Mo. 1221, 219 S.W. 2d 372 (1949); 4 C.J.S. Appeal & Error §240 (1957). This is especially true when the constitutional question is decisive of the appeal, In re Clark's Estate, 105 Mont. 401, 74 P.2d 401, 114 A.L.R. 496 (1937), or when the point is one of law and not dependent on facts that might have been presented below had the point been there raised. Stierle v. Rohmeyer, 218 Wis. 149, 260 N.W. 647 (1935).

State officials, including supreme court justices, are by constitutional mandate required to take an oath or affirmation to support the constitution of this state. S.D. Const. Art. XXI, §3. Courts, above all, must jealously protect the integrity of the constitution. In the case of In re Clark's Estate, supra, the Montana Supreme Court supported its consideration of

a state constitutional issue not raised by the parties with this reference to the oath:

> In the case of Marbury v. Madison, 1 Cranch 137, 179, 2 L.Ed. 60, Chief Justice Marshall, after reviewing various provisions of the Federal Constitution, said: "From these, and many other selections which might be made, it is apparent, that the framers of the constitution contemplated that instrument, as a rule for the government of courts, as well as of the legislature. Why otherwise does it direct the judges to take an oath to support it? This oath certainly applies, in an especial manner, to their conduct to their official character. How immoral to impose it on them, if they were to be used as the instruments, and the knowing instruments, for violating what they swear to support! * * * Why does a judge swear to discharge his duties agreeable to the constitution of the United States, if that constitution forms no rule for his government? If it is closed upon him, and cannot be inspected by him? If such be the real state of things, this is worse than solemn mockery. To prescribe, or to take this oath, becomes equally a crime."

Id. 105 Mont. at ___; 74 P.2d at 406. We would be less than supportive if we failed to meet that which is constitutionally offensive.

In 1970 the people of South Dakota amended Article III, Section 25 of our constitution by adding a provision authorizing games of chance by public-spirited organizations. If it be the will of the people to license, tax and thus authorize privately operated games of chance, that likewise requires further amendment. It cannot be done by the legislature.

Reversed.

All the Justices concur.

APPENDIX H

STATE OF SOUTH DAKOTA) IN CIRCUIT COURT
:SS
COUNTY OF HUGHES) SIXTH JUDICIAL CIRCUIT

BARRY E. BAYER,) Civ. 82-430
Petitioner &
Appellant,) ORDER

-vs-)

R. VAN JOHNSON,)
SECRETARY OF REVENUE
FOR THE STATE OF SOUTH)
DAKOTA,
Respondent &)
Appellee.

The Petitioner having appealed from the denial of the Secretary of Revenue of his application for a refund of sales tax under SDCL 10-45-4, and the matter having been briefed to the Court and oral arguments heard, and the Court being fully advised in the premises, and having issued its Memorandum Decision dated July 26, 1983, which Memorandum Decision is incorporated herein by reference, it is hereby

ORDERED that the Decision, Findings and Conclusions of the Secretary of Revenue are hereby affirmed; and

IT IS FURTHER ORDERED that the Appellant is liable for tax on his total gross receipts including not only the vigorish but the wager itself and therefore is not entitled to a refund of taxes paid.

Dated this 27th day of July, 1983.

ATTEST:

APPENDIX I

STATE OF SOUTH DAKOTA) IN CIRCUIT COURT
:SS
COUNTY OF HUGHES) SIXTH JUDICIAL CIRCUIT

BARRY E. BAYER,) Civ. 82-430
Petitioner &
Appellant,) MEMORANDUM DECISION

-vs-)

R. VAN JOHNSON,)
SECRETARY OF REVENUE
FOR THE STATE OF SOUTH)
DAKOTA,
Respondent &)
Appellee.

This is an administrative appeal from a decision of the South Dakota Secretary of Revenue (Secretary) which denied Appellant's application for a refund of sales tax under SDCL 10-45-4. This Court affirms the Secretary's decision.

PROCEDURAL HISTORY

Barry E. Bayer, appellant, holder of a retail sales tax license, made payment under protest of sales tax on October 30, 1981, in the amount of $11,167.48. On January 31, 1982, appellant again made a sales tax payment under protest to the South Dakota Department of Revenue (Department) in the

amount of $26,426.67. Appellant timely filed a Petition for Recovery of Sales Tax Paid Under Protest after each payment of sales tax had been made. Appellant argues that the Department wrongfully collected the amount of sales tax due because of the Department's misapplication of the definition of "gross receipts" with respect to the services provided by appellant. On March 22, 1982 a hearing was held before R. Van Johnson, Secretary of Revenue. Secretary Johnson concluded that appellant's tax payment was not in excess of the legal tax due, and on November 4, 1982 issued Findings of Fact and Conclusions of Law supporting his decision. An Order Denying Appellant's Petition for Refund was issued by Secretary Johnson on November 24, 1982. On December 7, 1982 appellant filed a Notice of Appeal with the Clerk of Courts of Hughes County. Oral arguments were heard before this Court on June 26, 1983.

Upon hearing oral arguments, examining the applicable statutes, the file and the legal briefs submitted by counsel, the Court hereby disposes of this matter in the following memorandum decision.

FACTS

SDCL 40-45-5.2 enumerates a number of services set out in the Standard Industrial Classification Manual which are subject to sales tax. One such category is Amusement and Recreational Services (major group 79). Included within the 92 listed services under Amusements and Recreational Services is "bookies" and "bookmakers race".

Appellant is a bookmaker. He has been granted a South Dakota Retail Occupational Sales Tax License for a service business in the areas of amusements. Hence, appellant acknowledges that by engaging in a bookmaking operation he is subject to sales tax.

During the Departmental hearing, appellant produced Joey Boston a retired

bookmaker from Las Vegas, Nevada. Mr. Boston explained the normal bookmaking operation.

In the normal bookmaking operation the bookmaker takes a wager from the customer. The standard in the United States is that the customer or bettor has to lay 11 to 10 to the bookmaker. For explanation purposes, a $100.00 bet by a customer means that the customer is actually risking $110.00. The $110.00 represents a $100.00 bet plus a $10.00 service charge, or what is commonly referred to in the bookmaking world as "vigorish". If the customer wins the bet he receives $100.00. If the customer loses the bet, he pays the bookmaker $110.00. No money is actually exchanged until the settlement day, which is normally the day following the event upon which the bet was made.

Appellant under protest filed 1981 third and fourth quarter tax returns. In the third quarter, appellant reported gross receipts in the amount of $223,349.50, and paid sales tax in the amount of $11,167.48. In the fourth

quarter, he reported gross receipts in the amount of $528,308.00, and paid sales tax in the amount of $26,426.67.

Appellant is challenging the method of assessing the amount of his gross receipts. John Dewell, Assistant Attorney General for the Department directed appellant to determine the amount of gross receipts upon which sales tax is assessed, in the following manner:

> A bookmaker collects from persons who have unsuccessfully placed bets with him plus his fee of whatever that might amount to - ten or twenty dollars per hundred. He would therefore have on one hundred dollars ($100) a taxable gross of one hundred twenty dollars ($120).

Appellant concedes he is subject to the sales tax. However, appellant maintains that the sales tax should be assessed only on the "vigorish" and not the wager itself. Appellant argues that on a $100.00 bet in which the customer loses and pays appellant $110.00, appellant is required to pay sales

tax only on the $10.00 vigorish collected and not the $100.00 wager itself.

DECISION

Initially, the Department has challenged the legality of appellant's Petition in Protest of Sales Tax paid. The Department maintains the appellant was required to submit a verified petition for refund of taxes and he failed to do so. The Court has considered this argument and finds no merit in the claim.

Appellant is challenging the Department's definition of gross receipts in SDCL 10-45-1(2) and service in SDCL 10-45-4.1 in regard to a bookmaking operation. A decision in this case involves primarily interpretations of statute.

The Court recognizes the general rule reiterated by Justice Wollman in Nash Finch Co. v. S.D. Dept. of Revenue, 312 NW2d 470 (S.D. 1981), concurring opinion. "In construing statutes governing tax proceedings, . . . the legislative intent is the

vital and controlling factor." Unfortunately, the South Dakota Legislature has failed to give any direction in reference to their specific intent to tax a bookmaking operation. What the legislative intent is in reference to imposing a sales tax on a bookmaking operation is not clear. Thus, the Court must proceed to make a determination and attempt to follow guidance previously given by our Legislature in regard to tax matters generally.

In rendering a decision the Court recognizes that "statutes imposing taxes are to be construed liberally in favor of the taxpayer and strictly against the taxing body. Nash Finch, supra, at 472. "Ambiguities" in a statute imposing a tax are interpreted in favor of the taxpayer. Supra.

Pursuant to SDCL 10-45-4 a tax is imposed upon the gross receipts of any person engaging or continuing in the practice of any business in which a service is rendered. Appellant does not deny that he is subject to

this tax provision. Appellant's protest evolves from the determination that the definition of "gross receipts" in regard to a bookmaking operation includes the wager as well as the vigorish.

SDCL 10-45-1(2) provides the definition of gross receipts:

> 'Gross receipts' means the amount received in money credits, property, or other money's worth in consideration of sales at retail within this state, without any deduction on account of the cost of the property sold, the cost of the materials used, the cost of labor or services purchased, amounts paid for interest or discounts, or any other expenses whatsoever, nor shall any deduction be allowed for losses. . .

This statute is decisive. It clearly states that "gross receipts" means the amount of money received without any deduction for the costs of the services purchased. Appellant wishes to limit gross receipts to the cost of the services purchased. This is not what the statute mandates. The statute is

clear in requiring that gross receipts means the total amount of money received.

This Court has not found, nor has either counsel cited any case which would appear to be directly on point or controlling. The Court has, however, found a number of cases dealing with the inclusion of a service charge as a part of the total "gross receipts". See Cohen v. Playboy Clubs International, Inc., 311 NW2d 336, 1974; Youngstown Club v. Porterfield, 255 NE2d 262, 1970; Baltimore Country Club v. Comptroller of the Treasury, 321 A.2d 308, 1974.

Appellant has cited St. Paul Hilton Hotel v. Comm. of Taxation, 214 NW2d 351 (1974) as case authority supporting his contentions. That case is not analogous, however, because the Minnesota statute specifically provided for the deduction of service charges from the total bill if such charges were separately stated. Supra, at 352. South Dakota has no similar statute appellant may rely upon.

It appears clear to this Court that our Legislature intended to impose a sales tax on the total gross receipts of any person engaging in a business providing a taxable service.

Therefore, this Court holds that the Department was correct in determining the proper definition of "gross receipts" for a bookmaker includes not only the vigorish but the wager itself, and that appellant is not entitled to a refund.

Counsel for the Department is directed to prepare an order consistent with this opinion, incorporating the same therein by reference.

Dated this 26th day of July, 1983.

ATTEST:

APPENDIX J

STATE OF SOUTH DAKOTA
DEPARTMENT OF REVENUE
* * * * * * * * * * *

BARRY E. BAYER, Plaintiff,	)	ORDER
vs.	)	
R. VAN JOHNSON, SECRETARY OF REVENUE FOR THE STATE OF SOUTH DAKOTA, Respondent.	)	

Based on the Memorandum Decision in the above-entitled matter and the Findings of Fact and Conclusions of Law that were entered, it is now ordered that the Petition of Barry Bayer for refund of South Dakota Retail Occupational Sales Tax be denied.

Dated this 24th day of November, 1982.

ATTEST:

APPENDIX K

STATE OF SOUTH DAKOTA
DEPARTMENT OF REVENUE
* * * * * * * * * * *

BARRY E. BAYER, Plaintiff, vs. R. VAN JOHNSON, SECRETARY OF REVENUE FOR THE STATE OF SOUTH DAKOTA, Respondent.	)	FINDINGS OF FACT CONCLUSIONS OF LAW

Pursuant to notice, a hearing was held before the Secretary of Revenue on the petition of Barry Bayer for refund of South Dakota Retail Occupational Sales Tax. A Memorandum Decision was rendered and these Findings of Fact and Conclusions of Law are made and entered accordingly.

FINDINGS OF FACT

That Barry Bayer is the holder of a South Dakota Retail Occupational Sales Tax License.

That Barry Bayer filed sales tax returns and paid under protest for the third and fourth quarters of 1981.

That Barry Bayer showed gross receipts of $751,882 on which a tax was paid of $37,594.15 for quarters three and four, 1981.

That no competent evidence was presented to show that Barry Bayer's gross receipts were less than $751,882 for the third and fourth quarters of 1981.

CONCLUSIONS OF LAW

That the Secretary of Revenue has jurisdiction of the subject matter of this action.

That Barry Bayer is engaged in a taxable occupation, the gross receipts of which are subject to taxation.

That Barry Bayer's tax payment is not in excess of the legal tax due based on his gross receipts for the third and fourth quarters of 1981.

Dated this 4th day of November, 1982.

ATTEST:

APPENDIX L

South Dakota Department
of Revenue
Office of the Secretary
R.F. Kneip Bldg.
700 N. Illinois
Pierre, SD 57501-2276
Phone 605/773-3311

August 30, 1982

Thomas K. Wilka
Attorney at Law
Suite 418
First Financial Center
Sioux Falls, South Dakota 57102

John Dewell
Assistant Attorney General
State Capitol
Pierre, South Dakota 57501

RE: Sales Tax Protest of Barry E. Bayer

Gentlemen:

Barry E. Bayer, a retail sales tax licensee, made payment under protest of sales tax on October 30, 1981, in the amount of eleven thousand one hundred sixty-seven dollars forty-eight cents ($11,167.48). He likewise on January 31, 1982, paid under protest twenty-six thousand four hundred twenty-six dollars sixty-seven cents ($26,426.67). His Petition for the Recovery of Sales Tax Paid was timely filed and in

each instance he sought recovery of the full amount of the tax paid under protest--that is eleven thousand one hundred sixty-seven dollars forty-eight cents ($11,167.48) and twenty-six thousand four hundred twenty-six dollars sixty-seven cents ($26,426.67). A hearing was held on both petitions on March 22, 1982. The licensee did not appear but was represented by counsel. The question presented is, "Are the gross receipts of this licensee subject to sales tax."

It has not been disputed that the licensee is engaged in a taxable occupation pursuant to SDCL 10-45-5.2. The tax levied is at the same rate as that imposed upon the sales of tangible personal property and is upon the gross receipts of the person continuing in the business. Gross receipts are defined in SDCL 10-45-1(2) as:

> (2) 'Gross receipts' means the amount received in money, credits, property, or other money's worth in consideration of sales at retail within this state, without any deduction on account of the cost of the

> property sold, the cost of the materials used, the cost of labor or services purchased, amounts paid for interest or discounts, or any other expenses whatsoever, nor shall any deduction be allowed for losses. Discounts for any purpose allowed and taken on sales shall not be included as gross receipts, nor shall the sale price of property returned by customers when the full sale price thereof is refunded either in cash or by credit. On all sales of retailers, valued in money when such sales are made under conditional sales contract, or under other forms of sale wherein the payment of the principal sum thereunder be extended over a period longer than sixty days from the date of sale thereof that only such portion of the sale amount thereof shall be accounted, for the purpose of imposition of tax imposed by this chapter, as has actually been received in cash by the retailer during each quarterly period as defined herein.

As used in this definition, the words "sale at retail" mean either the sale of tangible personal property or <u>services</u> or both to the consumer or user thereof. SDCL 10-45-1(5).

In the present case the Petitioner's business is somewhat different from a normal service business because it is not every transaction which results in gross receipts to the retailer. For the purposes of this decision I consider a transaction to be the total business done by the retailer with any one customer at any one time.

There is no competent evidence in this record of the basis upon which the taxes paid under protest were computed. The mere statement in the Petition for Recovery of Sales Tax that the payment was based on a certain method of assessment does not sustain the Petitioner's burden of establishing that as a fact, even though the petition was verified by the attorney for the Petitioner. I must therefore deny the petition for refund.

I would request that Mr. Wilka and Mr. Dewell prepare Findings and Conclusions on this matter.

Very truly yours,

R. Van Johnson
Secretary

APPENDIX M

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

BARRY E. BAYER,
Petitioner and
Appellant,

-vs-

R. VAN JOHNSON,
Secretary of Revenue
for the STATE OF SOUTH
DAKOTA,
Appellee.

ORDER DENYING
REHEARING

#15224

A petition for rehearing in the above case having been filed March 2, 1987, and no issue or question of law or fact appearing to have been overlooked or misapprehended, and more than fifteen days having elapsed therefrom and no written statement having been filed with the Clerk of this Court by a majority of the justices thereof requesting a rehearing, now, therefore, in accordance with the Rehearing Procedure Rule of this Court, the petition for rehearing is denied.

Dated at Pierre, South Dakota, this 18th day of March, 1987.

ATTEST:

APPENDIX N

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

BARRY E. BAYER,
Petitioner and
Appellant,

-vs-

R. VAN JOHNSON,
Secretary of Revenue
for the STATE OF SOUTH
DAKOTA,
Appellee.

#155224

PETITION FOR
REHEARING

Pursuant to SDCL 15-30-4, Petitioner and Appellant respectfully petitions the Court for a Rehearing on the question of whether Bayer can recover sales tax paid under protest to the Department of Revenue, for the reason that the Court overlooked or misapprehended the issue of whether the payment of sales tax on bookmaking receipts is an unconstitutional activity and that the Court did not consider its recent decision of Bayer v. State, 378 N.W.2d 223 (SD 1985).

In Bayer v. State, supra, (referred to herein as Bayer II) Bayer sought to recover $46,000 in back taxes previously paid through the Magistrate Court for Minnehaha County, as

part of a plea bargain on three felony charges of failure to file sales and service tax returns on his bookmaking receipts. Magistrate Court vacated the convictions on August 13, 1984, and subsequently held that Bayer was entitled to a refund of the monies paid to the Department. On appeal, this Court held as follows:

> The sentence clearly denominates the money as taxes, penalty and interest. At no time were these sums considered fines or costs which arguably could be returned to Bayer pursuant to State v. Piekkola, 90 S.D. 335, 241 N.W.2d 563 (1976). It was pure and simply regarded as unpaid sales taxes. Though SDCL 23A-31-1 retains jurisdiction for the magistrate court to correct an illegal sentence, it does not authorize refund of the monies paid pursuant to Bayer's plea agreement. Our legislature has provided an exclusive means for recovery of sales taxes paid and requires that jurisdiction is absent if the procedure established is not strictly followed. See, SDCL 10-55-1, through -8 (effective through June 29, 1982) and 10-55A-1 through -11.

This Court held in Bayer II that Bayer was not entitled to a refund of sales tax,

penalty and interest paid on bookmaking receipts solely because he did not follow the exclusive procedure established by the Legislature for recovery of sales tax paid. In the present case, Bayer did follow the exclusive procedure established by the Legislature and thus pursuant to Bayer II he should be entitled to his refund. The failure to award Bayer a recovery of his sales tax is in direct contradiction to this Court's holding in Bayer II.

Bayer further contends that the Court's refusal to allow Bayer access to the courts to recover sales tax paid on bookmaking activities constitutes a denial of his constitutional rights under the Fifth and Fourteenth Amendments to the United States Constitution which commands that no person shall be "deprived of . . . property, without due process of law; nor shall private property be taken for public use, without just compensation." The Court's refusal to allow Bayer access to the Courts is

tantamount to a taking of his property without due process.

The South Dakota Supreme Court in State v. Piekkola, 90 S.D. 335, 241 N.W.2d 563 (1976), recognized that the failure to return the fine and costs paid by an individual convicted of the unconstitutional statute of possession of less than an ounce of a controlled substance would constitute a violation of the Fifth Amendment prohibition against the taking of one's property without due process of law. Similarly in the present case, the Court's refusal to allow Bayer access to the Courts to seek a refund of a sales tax paid on an activity not subject to sales tax pursuant to the South Dakota Constitution is a taking of his property without due process. Other Courts have held consistently that it would be a violation of the Fifth Amendment for a State to fail to return a fine and costs collected from an individual pursuant to an unconstitutional conviction. See Ex Parte McCurley, 412 So.2d

1236 (Ala. 1982); United States v. Lewis, 342 F.Supp. 833 (E.D.La. 1972), aff'd 478 F.2d 835 (5th Cir. 1973); United States v. Summa, 362 F.Supp. 1177 (D.Conn. 1972); People v. Meyerowitz, 61 Ill.2d 200, 335 N.E.2d 1 (1975).

Furthermore, the United States Supreme Court has recognized that the Fifth Amendment precludes the imposition of a forfeiture statute on an individual not significantly engaged in criminal enterprise. See, United States v. U.S. Coin and Currency, 401 U.S. 715, 91 S.Ct. 1041, 28 L.Ed. 2d 434. While the South Dakota forfeiture statute was not imposed in this instance, the taking of the Petitioner's sales tax payments without allowing redress in the Court's in effect constitutes a forfeiture. The only criminal action filed against Bayer was for failure to file a sales tax return and that criminal conviction has been vacated. Thus, the imposition of a forfeiture provision in this

instance would be a denial of Bayer's Fifth Amendment due process rights.

This Court further held in its decision that public policy denies Bayer access to the Courts to recover taxes paid to engage in an unconstitutional and possible criminal activity. As the dissent indicates, in this case Bayer paid sales tax. The act of paying sales tax is not an unconstitutional activity and there would be no public policy served to deny taxpayers access to the Courts to petition for a sales tax refund. Such a holding would in fact encourage taxpayers who question the constitutionality of the taxing authority to withhold all payments of sales tax because the Courts may deny recovery of all taxes paid on possibly unconstitutional or criminal activity as being against public policy. SDCL 10-55A-3 requires a taxpayer to pay the taxes when due and seek recovery as provided in SDCL Ch. 10-55A. The statute further precludes the Courts from restraining or delaying the collection and payment of

sales tax. SDCL 10-55A-2 requires taxpayers to file a claim with the Department for recovery within one year from the date the tax was paid.

The public policy of this State as determined by the Legislature is to require taxpayers to pay all potential sales tax due and file for a refund pursuant to SDCL 10-55A. Even the Courts do not have authority to delay payment of sales tax. In the present case, Bayer followed state statute and paid the sales tax allegedly owed to the State, said payments being made under protest. Bayer then filed a petition for refund, again in compliance with state statutes. If this Court determines that public policy precludes Bayer from recovering a sales tax refund, the decision will send a message to all other taxpayers to withhold payment of tax if there is any question regarding the constitutionality of the taxed activity.

In addition, this Court relies on the case of Jasper v. Rossman, 73 S.D. 222, 41 N.W.2d 310 (1950) and the cases cited therein to support its conclusion that Bayer should be denied access to the Courts to recover taxes paid on an unconstitutional activity. As the dissent indicates, however, each of those cases involved transactions that were in and of themselves illegal. In Jasper v. Rossman, 73 S.D. 222, 41 N.W.2d 310 (1950), the suit was for the balance due on a sale of gambling equipment (punchboards). In Ferguson v. Yunt, 13 S.D. 120 82 N.W. 509 (1900), the suit was to recover on the bond of a stakeholder of a horse-racing bet. E. P. Wilbur Trust Co. v. Fahrendorf, 64 S.D. 124, 265 N.W.1 (1936), involved a suit to recover on a note executed under the inducement of an agreement not to prosecute for alleged embezzlement. In Bartron v. Codington County, 68 S.D. 309 2 N.W.2d 337 (1942), the suit was for recovery for services and supplies furnished indigents

under a contract between the county and a professional corporation of physicians when it was illegal for physicians to incorporate. Finally, Beverage Co. v. Villa Marie Co., 69 S.D. 627, 13 N.W.2d 670 (1944), was for recovery on an illegal transaction for the sale of saloon equipment by a beer distributor to a retail outlet.

The transaction before the Court in the present case involves the payment of sales tax. All non-exempt businesses pay sales tax on their gross receipts. The fact that Bayer paid sales tax on a business not subject to sales tax does not make that act an illegal transaction. The underlying act of paying sales tax is not illegal. Thus, Jasper v. Rossman, supra and the cases cited therein do not support the Court's conclusion that Bayer should be denied access to the Courts.

In Bayer v. Johnson, 349 N.W.2d 447 (S.D. 1984), hereinafter referred to as Bayer I, this Court recognized that the constitutionality of a statute cannot be raised for

the first time on appeal, unless the issue of constitutionality is raised sua sponte by the Court. In the present case, on appeal the State contended in its brief as follows:

> 1. That there was insufficient evidence in the record to determine whether the sales tax in question was collected on the proceeds of Appellant's business as a bookmaker.
>
> 2. That the Department of Revenue ruling was not clearly erroneous, arbitrary, capricious, or characterized by an abuse of discretion because Bayer refused to admit that he was a bookmaker.

The State did not raise the issue that public policy reasons denied Bayer access to the Courts and Bayer did not have an opportunity to respond to this issue. The public policy argument raised by the Court sua sponte in this case is not a constitutional question and no authority has been cited granting the Court jurisdiction to decide a public policy question on the Court's own motion. Thus, Petitioner contends the Court was without jurisdiction to raise the public policy issue sua sponte. Petitioner requests that if the

Court finds it did have jurisdiction to raise the public policy issue, then Petitioner should be granted the opportunity to address this complex issue during oral argument.

For all the reasons above cited, Petitioner respectfully requests that this Court grant the Petition for Rehearing.

Dated at Sioux Falls, South Dakota, this 27th day of February, 1987.